

CIVIL REVISION APPLICATION NO. 1998 OF 1996.

Date of decision: 28.1.1997.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. Tushar Mehta, advocate for the petitioner.

Mr. Devang T. Shah and Mr. B.P. Munshi, advocates for respondents.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain,J.

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January 28, 1997.

Oral judgment:

Rule. Mr. Devang T. Shah and Mr. B.P. Munshi, learned advocates waive service of rule.

The respondents/plaintiffs filed Civil Suit No. 135 of 1996 in the court of learned Civil Judge (J.D.) at Ankleshwar, challenging the imposition of octroi by the petitioner and also prayed for interim relief restraining the petitioner from collecting octroi. Application Ex.5 was rejected consequently the respondents preferred Civil Misc. Appeal No. 104 of 1996. During the course of

hearing of the appeal, the respondents desired to produce some additional evidence hence sought per mission of court vide Ex.21. Despite opposition by the petitioner the same was allowed. Hence, aggrieved by the said order passed below Ex.21, allowing respondents to produce additional evidence at the appellate stage, the defendant has filed this petition.

Law regarding production of additional evidence at appellate stage is well settled. There is no absolute bar that additional evidence cannot be produced at appellate stage. Additional evidence can be produced only in accordance with the provisions of Order 41 Rule 27 of the Civil Procedure Code. As provided in Rule 27, under following circumstances production of additional evidence is permissible:

- (i) an evidence which ought to have been admitted by trial court but production was refused,
- (ii) an evidence which though was in existence but was not in knowledge and despite exercise of due diligence could not be produced when the decree or order appealed is passed,
- (iii) an evidence which is required by the appellate court for pronouncing judgment with satisfaction.

Mr. Munshi, learned advocate for the respondents, has raised preliminary objection about maintainability of this application. But, in my view, in the facts and circumstances of the case, preliminary objection about maintainability has no force. Production of additional evidence at the appellate stage is purely a question of law and can be gone into by this court while exercising jurisdiction under Section 115 of the Civil Procedure Code.

In this case the order appealed against is passed on 5.8.1996. Admittedly, it is not the case of respondents that the evidence was sought to be produced before the trial court but has not been admitted. Similarly, the court on its own has also not required any party to produce additional evidence. In the result, the case would only be covered by the ground (ii) stated above. The respondents have to satisfy the court that the documents were in existence prior to 5.8.1996 when the order was passed and that was not within the knowledge and despite exercise of duly diligence applicants could not produce. On perusal of the list shown to the court

during the course of arguments it appears that the respondents have produced three affidavits of the members of the petitioner Gram Panchayat. The affidavits have been sworn on 14.10.1996, meaning thereby that they have come into existence only after passing of the order dated 5.8.1996 under challenge before the lower appellate court. Law does not permit production of any such document at appellate stage which has come into existence subsequently.

Thus, in my view, the court below has committed an error in permitting respondents to produce these affidavits as additional evidence at appellate stage. As regards rest of the documents, it cannot be gainsaid that they were in existence prior to the date of the order. Of course, the respondents have not made it very clear that existence was not in their knowledge and despite exercise of due diligence were not able to lay hands on such evidence. But in absence of any express evidence that though the evidence was within the knowledge and notice of the respondents was not deliberately produced before the trial court inference can be drawn that existence of rest of the documents was not in knowledge and despite due diligence could not be produced. Some of the documents are petitioner's own documents. Further, one document is copy of gazette and another is order passed by competent authority and communicated to the petitioner. Mr. Mehta for the petitioner has not been able to satisfy me as to why such evidence could not be permitted to be produced at appellate stage.

In the result, the order passed by the trial court below Ex.21 allowing the affidavits dated 14.10.1996 to be produced as additional evidence is hereby quashed and set aside. Rest of the order of the trial court stands confirmed. Application is partly allowed. Rule is made absolute to the aforesaid extent with no order as to costs.